IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.04.2021

CORAM

THE HON'BLE MR.JUSTICE M. DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

Tax Case Appeal Nos.1061 to 1065 of 2015

The Commissioner of Income Tax,
Chennai. ... Appellant in all 5 TCAs

Vs.

M/s.Dassault Systems Simulia Corporation
(formerly known as Abaqus Inc)
Rising Sun Mills, 166, Valley Street,
Providence, USA. ... Respondent in TCA.Nos.1061 to 1064/2015

M/s.Dassault Systems Simulia P. Ltd.,
10th Floor, ASVN Ramana Rower,
37 & 38, Venkatnarayana Road,
T.Nagar,
Chennai - 600 017. ... Respondent in T.C.A.No.1065/2015

Prayer : Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Madras "C" Bench, dated 09.01.2014 passed in I.T.A.Nos.1024 to 1027 & 1177/ Mds/2013 for the assessment year 2003-04, 2004-05, 2005-06, 2006-07 and 2009-10.

and

Preferred against the order of the office of the Commissioner of Income Tax (Appeals)-IX, No.121, Mahatma Gandhi Road, Chennai-600 034, ITA No.305/11-12 dated 22/02/2013, GIR No./PAN : AAACF4457B, and year of Assessment : 2009-10

and

against the order of the office of the Commissioner of Income Tax (Appeals)-IV, No.121, Mahatma Gandhi Road, Nungambakkam, Chennai-600 034, ITA Nos.5,6,7 & 8/2011-12, date of order : 07/02/2013, G.I.No./P.A.No : AADCD 3705D and year of Assessment : 2003-04, 2004-05, 2005-06 & 2006-07.

and

against the order of the Deputy Director of Income Tax (International Tanation), Chennai, PAN : AADCD 3705D Circle : DDIT International Tanation), Chennai, Status Foreign Company, Assessment year : 2006-07 and Date of order : 24/02/2011.

and

against the order of the Deputy Director of Income Tax (International Tanation), Chennai-34, PAN : AADCD 3705D Circle : DDIT International Tanation), Chennai, Status Foreign Company, Assessment year : 2005-06 and Date of order : 24/02/2011.

and

against the order of the Deputy Director of Income Tax (International Tanation), Chennai, PAN : AADCD 3705D, Circle : DDIT International Tanation), Chennai, Status Foreign Company, Assessment year : 2004-05 and Date of order : 24/02/2011.

and

against the order of the Deputy Director of Income Tax (International Tanation), Chennai, PAN : AADCD 3705D Circle : DDIT International Tanation), Chennai, Status Foreign Company, Assessment year : 2003-04 and Date of order : 24/02/2011.

and

against the order of the Assistant Commissioner of Income Tax, Company Circle I(4), Chennai, P.A/G.I.R.No :AAACF4457B, Ward/Circle : Company Circle I(4), Chennai, Status : Company, Assessment year : 2009-10 and Date of order : 19/12/2011.

For Appellant (in all 5 TCAs) : Mr.Karthick Ranganathan, Senior Standing Counsel

For Respondents (in all 5 TCAs) : Mr.Sandeep Bagmar.R

COMMON JUDGMENT
(Delivered by M.DURAISWAMY, J.)

Challenging the orders passed in I.T.A.Nos.1024 to 1027 & 1177/ Mds/2013 in respect of the Assessment Year 2003-04, 2004-05, 2005-06, 2006-07 and 2009-10 on the file of the Income Tax Appellate Tribunal, Madras "C" Bench, Chennai, the Revenue has filed the above appeals.

2.The appeals in T.C.A.Nos.1061 to 1064 of 2015 were admitted on the following substantial questions of law:

> "1)Whether on the facts and in the circumstances of the case, the Tribunal was right in deleting the additions made on account of royalty income which is taxable in terms of Section 9(1)(vi) of the Income Tax Act?
>
> 2)Is not the finding of the Tribunal bad especially as per Explanation (iv) was introduced by Finance Act, 2012 with retrospective effect from 01.04.1976 clearly provided that all types of transactions in software amounted to "royalty" for the purpose of Section 9(1)(vi) of the Income Tax Act and therefore taxable?
>
> 3)Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the disallowance made under Section 40(a)(ia) for non deduction of tax at source on payments effected by the assessee is not taxable under Section 9(1)(vi) of the Income Tax Act?"

3.The appeal in T.C.A.No.1065 of 2015 was admitted on the following substantial questions of law:

> "1)Whether on the facts and in the circumstances of the case, the Tribunal was right in deleting the disalllowance made under Section 40(a)(ia) for non deduction of tax at source on payments made by the assessee?
>
> 2)Is not the finding of the Tribunal bad since as per clauses 3D, 5B, 8A and 8B of the agreement entered between the assessee company and Abaques Inc USA clearly indicate that it was royalty as per definition in Article 12(3) of DTAA between India and USA?
>
> 3)Whether the finding of the Tribunal is correct especially when the payments made by the assessee fall under the category of royalty since what was sold by the assessee was copyright/licence only?
>
> 4)Whether on the facts and in the circumstances of the case, the Tribunal was right in not considering the fact that the consideration received would be in the nature of royalty in respect of transfer of all or any right including grant of licence falling under Clause (v) of Explanation 2 to Section 9(1)(vi)?"

4.We have heard Mr.Karthick Ranganathan, learned senior standing counsel appearing for the appellant - Revenue and Mr.Sandeep Bagmar.R, learned counsel appearing for the respondent - assessee.

5.Mr.Karthick Ranganathan, learned Senior Standing Counsel appearing for the appellant fairly submitted that the questions of law involved in the above appeals were already decided by the Hon'ble Supreme Court of India against the revenue and in favour of the assessee in the judgment reported in 2021 SCC OnLine SC 159 [Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Another], wherein the Hon'ble Supreme Court held as follows:

> " .... 4. The appeals before us may be grouped into four categories:
>
> i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.
>
> ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, nonresident suppliers or manufacturers and then reselling the same to resident Indian end-users.
>
> iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, nonresident seller, resells the same to resident Indian distributors or end-users.
>
> iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.
>
> 7. An appeal was made from the order of the ITAT to the High Court of Karnataka by the Revenue. The Division Bench of the High Court of Karnataka heard a batch of appeals and framed nine questions, of which question nos. 8 and 9 are important and are set out as follows:
>
> "8. Whether the Tribunal was correct in holding that since the assessee had purchased only a right to use the copyright i.e. the software and not the entire copyright itself, the payment cannot be treated as Royalty as per the Double Taxation Avoidance Agreement and Treaties, which [are]

beneficial to the assessee and consequently section 9 of the Act should not take into consideration.

....

171. The Revenue, therefore, when referring to "royalties" under the DTAA, makes a distinction between such royalties, no doubt in the context of technical services, and remittances for supply of computer software, which is then treated as business profits, taxable under the relevant DTAA depending upon whether there is a PE through which the assessee operates in India. This is one more circumstance to show that the Revenue has itself appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which is then treated as business income of the assessee taxable in India if it has a PE in India.

CONCLUSION

172. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9 (1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

173. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.

174. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

6.Mr.Sandeep Bagmar.R, learned counsel appearing for the respondents submitted that in view of the ratio laid down by the Hon'ble Supreme Court in the judgment reported in 2021 SCC OnLine SC 159 (cited supra) the questions of law may be decided against the revenue and in favour of the assessee.

7.On a reading of the judgment of the Hon'ble Supreme Court, it is clear that the substantial questions of law, which are raised in the present appeals, were already decided by the Hon'ble Supreme Court against the revenue.

8.Following the ratio laid down by the Hon'ble Supreme Court in the judgment reported in 2021 SCC OnLine SC 159 [cited supra], this Court, in the appeals in T.C.A.Nos.758 of 2013 [The Commissioner of Income Tax, Chennai Vs. M/s. Dasault Systems Sumulia Pvt. Ltd., 10th Floor, ASV N Ramana Tower, 37 & 38 Venkatnarayana Road, T. Nagar, Chennai - 600 017] and T.C.A.No.443 of 2017 [The Commissioner of Income Tax, Chennai Vs. M/s. Dasault Systems Sumulia Pvt. Ltd., (Formerly known as ABAQUS INC), Rising Sun Mills, 166, Vally Street, Providence, USA], by a common judgment dated 30.03.2021, decided the questions of law against the revenue and in favour of the assessee.

9.Following the ratio laid down by the Hon'ble Supreme Court in the judgment reported in 2021 SCC OnLine SC 159 [cited supra] and the common judgment of this Court dated 30.03.2021 made in T.C.A.Nos.758 of 2013 & 443 of 2017, the questions of law are decided against the revenue and in favour of the assessee. In view of the same, the Tax Case Appeals preferred by the appellant are liable to be dismissed. Accordingly, the Tax Case Appeals are dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

VA

To

1. The Income Tax Appellate Tribunal,
   Madras "C" Bench.

2. The Commissioner of Income Tax, Chennai.

3. The Commissioner of Income Tax (Appeals)IV,
   Chennai-34.

4. The Deputy Director and Income Tax,
   Chennai-34.

+1 cc to Mr.Sandeep Bagmar, Advocate, SR.No.22137

Tax Case Appeal Nos.1061 to 1065 of 2015

JP-II(CO)
TE (30/04/2021)